

1 THE STATE BAR OF CALIFORNIA
2 STANDING COMMITTEE ON
3 PROFESSIONAL RESPONSIBILITY AND CONDUCT
4 PROPOSED FORMAL OPINION INTERIM NO. 20-0005
5 CONVERSION CLAUSES IN CONTINGENCY FEE AGREEMENTS
6
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8 **ISSUES:** Under what circumstances, if any, are “conversion clauses” in contingent
9 fee agreements ethically permissible?
10

11 **DIGEST:** Conversion clauses are not ethically prohibited *per se*, but require careful
12 ethical scrutiny, and the circumstances where a conversion clause is
13 ethically permissible are rare. They are ethically prohibited where their
14 use may improperly interfere with important client rights or may violate
15 an attorney’s ethical duties, primarily the client’s right to discharge the
16 lawyer or the client’s right to determine whether to settle, and where
17 they would result in an unconscionable fee.
18

19 **AUTHORITIES**

20 **INTERPRETED:** Rules of Professional Conduct 1.2, 1.5, and 1.16 of the Rules of
21 Professional Conduct of the State Bar of California.¹
22

23 **INTRODUCTION AND SCOPE**

24 This opinion addresses the ethical permissibility of conversion clauses in contingent fee
25 agreements. For purposes of this opinion, where an attorney-client fee agreement provides for
26 the attorney to be paid a contingent fee, a conversion clause is a contractual provision that, if
27 triggered, converts the fee due to a lawyer from that contingent fee to an alternate fee
28 arrangement. Conversion clauses may be drafted so as to be triggered by specified events, but
29 in practice they are typically triggered upon (1) the termination of the attorney-client
30 relationship, or (2) the client’s failure to follow the lawyer’s recommendation regarding
31 whether to accept a settlement proposal.²

¹ Unless otherwise indicated, all references to “rules” in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

² This opinion is not intended to address the ethical validity or enforceability of hybrid fee agreements, which are distinct from conversation clauses and usually involve the payment of attorneys’ fees in some combination of an hourly rate, flat rate, or contingency fee. For some analysis on ethical issues related to hybrid fee agreements, see San Francisco Bar Association Opinion 1999-1 (opining that as long as the client enters into the fee agreement in an arm’s length transaction and agrees to the fee with informed consent, such arrangements would be permissible under the California Rules of Professional Conduct (former rule 4-200, current rule 1.5) provided the fee charged is not unconscionable).

CLEAN

It is the view of the Committee that conversion clauses are not ethically prohibited *per se*, but whether a conversion clause is ethically permissible must be carefully evaluated on a case-by-case basis. Conversion clauses are ethically permissible only where they do not interfere with the client's right to discharge the lawyer or the client's right to determine whether to settle, and where they would not result in an unconscionable fee. Therefore, the circumstances of each representation, as well as the precise terms of the fee arrangement and conversion clause, must be carefully scrutinized to ensure that neither the client's right to discharge counsel nor the client's right to decide whether or not to settle (and on what terms) are burdened, and also to ensure that the conversion clause would not result in an unconscionable fee.³ Because conversion clauses are often complex in their operation, the sophistication of the client is also an important consideration. The Committee notes that when this analysis is performed, the circumstances wherein a particular conversion clause may be ethically permissible are rare.

DISCUSSION

A. The Client's Right to Discharge Counsel.

Both the rules and California decisional law confirm a client's absolute right to discharge his or her attorney. Rule 1.16(a)(4); *Fracasse v. Brent* (1972) 6 Cal.App.3d 784; *Kroff v. Larson* (1985) 167 Cal.App.3d 857, 860 (client has absolute right at any time to discharge an attorney, with or without cause). Conversion clauses must be scrutinized to ensure that they do not directly or indirectly interfere with this right. For example, conversion clauses which purport to entitle a lawyer in a contingent fee representation, if terminated, to his or her hourly rate for hours worked (regardless of whether the contingency occurs, or what amount is recovered) pose a high risk of interfering with the client's right to discharge counsel. See, *Fracasse, supra* (improper to burden the client [in contingency cases] with an absolute obligation to pay the attorney regardless of outcome). Often a client in a contingent fee representation does not possess the means to pay an hourly fee, and has retained contingent fee counsel for this reason. A conversion clause that requires the client to pay the lawyer's hourly rate if the attorney is discharged is likely to impermissibly interfere with the client's absolute right to discharge the lawyer, and must be carefully scrutinized for this possibility. See, *Colorado State Bar Ethics Opinion 100*; *Compton v. Killtelson* (2007, Alaska Supreme Court) 171 P.3d 172 (contingent fee agreement which retroactively converted to hourly fee upon discharge of attorney was unconscionable and violation of Model Rule 1.2); *U.S. Postal Service v. Haselrig Corp* (D. Md. 2004) 349 F. Supp. 2d 955 (agreement that attempted to unlawfully penalize client for discharge of attorney (by requiring payment of 40% contingency or flat \$35,000) was "unreasonable at inception").

³ This opinion concerns only the issue of whether conversion clauses are ethically prohibited, not whether or to what extent they are legally enforceable. Additionally, this opinion does not address the propriety or enforceability of attorney's liens resulting from conversion clauses.

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A conversion clause may not penalize a client who discharges the lawyer. Lawyers often argue that conversions clauses are necessary to “protect” contingent fee lawyers from bad-faith termination by wily clients. However, in appropriate circumstances, established law already protects a contingent fee lawyer under the principles of *quantum meruit*,⁴ which allow a terminated contingent attorney to receive a fee commensurate with the reasonable value of the services provided. Because the existing principles of *quantum meruit* already provide a discharged attorney (who is not otherwise disentitled to a fee) to receive a reasonable fee for the services performed, the Committee is skeptical of the claimed need for further “protection” which would entitle a discharged contingent fee attorney to more than a reasonable fee.⁵ As the court in *Fracasse* noted (in a different but related context): “we find no injustice in a rule awarding a discharged attorney the reasonable value of the services he has rendered up to the time of discharge”, a rule which the Court noted, “preserve[s] the client's right to discharge his attorney without undue restriction, and yet acknowledge[s] the attorney’s right to fair compensation for work performed.” *Fracasse* at 791. In practice, many conversion clauses are merely improper penalties masquerading as attorney “protections.” A conversion clause that operates as a penalty for a client discharging a lawyer improperly burdens the client’s right to do so, and is ethically prohibited.

Related to the issue of unconscionability (addressed in Section C. below) is whether the conversion clause provides for an alternate fee which would have the effect of improperly restricting a client’s right to discharge counsel by rendering the representation unreasonably unappealing to potential successor contingency counsel. For example, a conversion clause which claims to entitle a terminated contingency-fee lawyer to more than a *quantum meruit* fee, no matter how much work has been performed or remains to be performed, is likely to make it impossible for the client to secure replacement counsel, thus impermissibly burdening the client’s right to discharge counsel.⁶

⁴ “Quantum meruit” refers to the principle that the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered. The doctrine of *quantum meruit*, where appropriate, allows attorneys to recover the reasonable value of their services even in the absence of a valid or enforceable contract. See, *Sheppard, Mullin, Richter & Hampton, LLP v J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 88. Although beyond the scope of this opinion, California has a well-developed body of law concerning when a discharged lawyer’s conduct entitles or disentitles the lawyer to a reasonable fee (i.e. a *quantum meruit*, recovery) such as where a contingent fee attorney withdraws from the case without justifiable cause (see generally, *Rus Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal. App. 4th 656; *Hensel v. Cohen* (1984) 155 Cal. App. 3d, 563; *Fracasse*, supra, 791) or certain ethical violations such as an egregious conflict of interest (see generally *Cal Pak Delivery, Inc. v. United Parcel Service Inc.* (1997) 52 Cal. App. 4th 1).

⁵ For further analysis on the factors involved in determination of a reasonable fee, see State Bar of California Arbitration Advisory 1998-03.

⁶ In addition to impermissibly interfering with a client’s right to discharge the lawyer, such a conversion clause may likely also be found to be an attempt to charge or collect an unconscionable fee, and must be appropriately evaluated on that basis as well. See, *In re Van Sickle* (Cal. Bar. Ct. Aug. 24, 2006). Accord, *Colorado Ethics Opinion 100*, supra.

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For these reasons, it is the view of the Committee that any conversion clause which purports to entitle a discharged contingent-fee attorney to more than *quantum meruit* is likely to be ethically prohibited, and the circumstances in which such a conversion would be ethically permissible are rare. Further, it is the view of the Committee that a conversion clause which seeks to entitle a contingent-fee lawyer to *any* fee in circumstances under which that contingent-fee lawyer would otherwise be legally disentitled to recover a fee in *quantum meruit*, is ethically prohibited. (See footnote No. 3, *supra*).

The Committee also notes that a lawyer's contingent fee typically includes a premium for the risk that the contingency may not occur. A conversion clause that allows a lawyer to effectively avoid contingent risk likely renders the ostensible "contingent fee" not contingent at all, and therefore the charging of a risk-premium may be unconscionable. Moreover, whereas a *quantum meruit* fee may not exceed the contract price,⁷ under a conversion clause the hourly rate fee which the lawyer might claim might contain no such limit and may even exceed the total value of the case.

Timing of the payment of the alternate fee is also an important factor for analysis. If a conversion clause entitles a lawyer (upon discharge) to an *immediate* fee, prior to the occurrence of the contingency, such a clause is likely to interfere with a client's right to discharge counsel, and likely to be ethically prohibited. Thus, even an alternate fee that would not be improper or unconscionable if payment were due at the time of the contingent recovery, may be ethically prohibited if its timing is such that it interferes with the client's right to discharge the lawyer.

In light of these considerations, it is the view of the Committee that a conversion clause triggered by the termination of the lawyer (whether initiated by the lawyer or the client) which purports to entitle the lawyer to a non-contingent fee regardless of whether the contingency actually occurs or in what amount, is likely to be ethically prohibited for improperly burdening a client's right to discharge their lawyer

Additionally, in appropriate circumstances, a conversion clause must also be scrutinized to ensure it is not inconsistent with a lawyer's advertisements or assurances to potential clients. For example, any conversion clause that would provide for a lawyer to be entitled to non-contingent alternate fee likely would be ethically impermissible where the lawyer had advertised or made a representation to the client to the effect that no fee would be due unless the client recovers.

⁷ *Cazares v. Saenz* (1989) 208 Cal.App.3d. 279.

B. The Client's Right to Decide Whether or Not to Settle.

A lawyer is ethically required to abide by a client's decision concerning the objectives of the representation. The rules expressly extend this precept to the decision to accept or reject a settlement offer. "[A] lawyer shall abide by a client's decision whether to settle a matter," rule 1.2(a). Nonetheless, conversion clauses are often designed to "protect" an attorney against a client's unreasonable or even bad-faith decisions regarding whether to accept or reject settlement proposals contrary to the lawyer's recommendation.

Such conversion clauses often purport to entitle the lawyer to payment of the lawyer's contingent fee percentage calculated against any settlement offer that the lawyer recommends the client to accept, but which the client rejects. Alternatively, some clauses entitle a lawyer to the lawyer's hourly rates if the client accepts a settlement offer (or walk-away agreement) which the lawyer believes is insufficient.

While ethics committees of other states have approached such settlement-related conversion clauses from a variety of perspectives, all tend to carefully scrutinize such clauses. By way of example only, see, *Wis State Bar Prof'l Ethics Comm. Formal Op. E-82-5* (1982) (a contingent fee agreement that permits charging hourly fees if attorney deems a settlement offer inadequate is overreaching and unethical); *Philadelphia Bar Association Ethics Opinion* 2001-1 (majority opinion would permit conversion where there is clear advanced agreement on the goals of representation and agreement as to alternate methods of compensation if the client's goals change; the minority opinion would permit conversion clauses for sophisticated clients, not unsophisticated clients); *Nebraska Ethics Advisory Opinion* 95-1 (a provision triggered by a client not following attorney's settlement advice, which allows the attorney to choose between the contingent percentage or full hourly fee, restricts the client's authority to settle a matter).

The Committee agrees that careful scrutiny of settlement-related conversion clauses is required, and that settlement-related conversion clauses are ethically permissible only in very limited circumstances where the attorney and client clearly and effectively agree to specific objectives of the representation in advance, agree to an alternate fee if the client should change her or his mind about those objectives, and where the conversion clause at issue under the specific circumstances presented, does not restrict the client's right to decide whether to settle, and on what terms.⁸

It is the view of the Committee that the requirement imposed by rule 1.2(a) that "a lawyer shall abide by a client's decision whether to settlement a matter" is clear and unwaivable, and its elimination by contract is simply not permitted under rule 1.2(b). See, for example, *Amjadi v. Brown* (2021) 68 Cal App. 5th 383, holding that a provision in a fee agreement purporting to

⁸ For Example, see *LACBA Formal Ethics Opinion No. 505* (2000) which approved of an engagement agreement by a public interest law firm which waived all attorney's fees only so long as the client did not enter into any settlement agreement which required confidentiality. It is the view of this committee that such an arrangement permissibly falls within now exceptions articulated above, and therefor is not prohibited.

grant the lawyer the right to accept a settlement offer on behalf of the client in the lawyer's "sole discretion" violates the rules and is void;⁹ *See also, In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 314-315 in which the State Bar court held that "[a]ttempts by an attorney to restrict a client's right to control his or her case are invalid and evidence of overreaching." A conversion clause that interferes with a client's right to determine whether to settle is ethically prohibited.¹⁰ Thus, conversion clauses keyed to the acceptance or rejection of settlement offers are ethically prohibited, except in the rare and narrow circumstances where (1) the goals of the representation are clearly understood and agreed-to in advance, (2) the lawyer and client also agree in advance to an alternate payment method that complies with rule 1.5, and, closely related, (3) the goals and alternate payment arrangement are communicated to the client in a manner that should be reasonably be understood by the client and confirmed by the client, and (4) the operation of the conversion clause under the circumstances is not otherwise unconscionable under rule 1.5.

C. The Attorney's Duty Not to Seek or Collect an Unconscionable Fee.

Rule 1.5 prohibits a lawyer from making an arrangement for, charging, or collecting an unconscionable fee, and sets forth 13 factors to be considered (without limitation) in determining the unconscionability of a fee. Just as any contingent fee must comply with rule 1.5, so too must any alternate fee arising from a conversion clause. Conversion clauses can impact an unconscionability analysis in numerous ways, and the determination of whether a conversion clause would result in an unconscionable alternative fee requires analysis of the conversion clause both as it is written, and as it is applied to a specific factual scenario.

In evaluating whether a conversion clause tied to termination of the lawyer is unconscionable and therefore ethically prohibited, important factors include consideration of whether a conversion clause triggers an alternate fee regardless of whether the relationship is terminated by the client or the attorney, and regardless of the reason for the termination. Careful ethical scrutiny is particularly warranted where the fee agreement allows conversion to be subject to manipulation by the lawyer, for example, by allowing the lawyer to claim the higher fee where it is the lawyer who causes the termination of the attorney-client relationship. A conversion clause of this type could encourage lawyers terminate a representation (and even to abandon the client) when it is to the lawyer's economic advantage to terminate a representation in order to trigger an alternate fee. Conversion clauses which would permit and incentivize such divided loyalty and overreach are not ethically permissible.

⁹ *Amjadi* also held that attempts by lawyers to wrest control from clients as to settlement decisions not only violate rule 1.2, but also create a conflict of interest between the lawyer and client under rule 1.7(b) whenever the client and attorney disagree about settlement.

¹⁰ Such conversion clauses also may introduce an improper speculative element in favor of the lawyer: who can know whether the opposing party would or could have actually performed under the rejected agreement against which the lawyer now seeks to determine his or her fee? Such uncertainty is indicia of overreach by a lawyer which further invades the client's right to determine whether or not to settle.

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A conversion clause which calls for payment of an alternate contingent fee *prior* to, or *regardless* of, the occurrence of the contingency, is functionally not a contingent fee at all, and is unlikely to survive an unconscionability determination if its amount would typically reflect a risk premium where such risk is not in fact present. *See* rule 1.5 (b) (1), (2) (concerning over-reach, fraud, and failure to disclose material facts).

In any unconscionability analysis, the sophistication of the client is a relevant consideration. *See*, rule. 1.5 (b)(4), *Cotchette, Pitre & McCarthey v. Universal Paragon Group* (2010) 187 Cal. App. 4th 1405. Conversion clauses can be complex in construction and effect, and difficult to understand. Thus, the client's level of sophistication as a consumer of legal services should be considered.

Similarly, a conversion clause which requires payment of a pre-determined contingent fee to a discharged lawyer, regardless of the work actually performed or amount of work remaining in the matter, is unlikely to survive an unconscionability analysis, particularly if triggered early in a representation.¹¹ *See* rule 1.5 (b)(3), (7), (12); *see also Matter of Scapa & Brown* (Rev. Dept. 1993) (although finding culpability for other violations, when assessing aggravating and mitigating circumstances, the Review Dept. noted that the attorney's fee contract required payment of attorney's full contingent fee percentage even if discharged and in the alternative entitled the attorney to payment of a "minimum" hourly fee if client discharged attorney regardless of work performed, and that the attorneys "knew" that if discharged for any reason they were limited to the reasonable value of services (per *Fracasse, supra*)).¹² A conversion clause which converts a contingent fee to the attorney's hourly rate upon termination of the attorney-client relationship must be carefully evaluated for unconscionability and overreach, especially where, because a representation began primarily as a contingent fee representation, the lawyer may or may not have incurred excessive or unreasonable hours on the matter.¹³

FACTUAL SCENARIOS AND ANALYSIS OF EACH

Scenario No. 1: Fee agreement for a litigation matter provides that Lawyer will be paid a contingent fee of 35% of the recovery, but if Lawyer is discharged by the client prior to

¹¹ This opinion does not address agreements between attorneys, or between departing attorney's and their firms, as to the respective entitlement of a contingent attorney's fee portion of a client recovery (where such agreement does not affect the amount of recovery to which the client is entitled). Such circumstances are not conversion clauses as addressed by this opinion. They are governed by rule 1.5.1 and other authorities, and are beyond the scope of this opinion.

¹² As is discussed in Section A., *supra*, established law already provides for payment to discharged contingent fee counsel on a *quantum meruit* basis where appropriate.

¹³ While Rule 1.5 determines unconscionability for purposes of an attorney's ethical duties, California law requires that attorney fee agreements and billings "must be fair, reasonable and fully explained to the client". *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App. 4th 419, 430-31 (quoting *Altschul v. Syble* (1978) 83 Cal. App. 3d 153, 162). Again, the legal enforceability or unenforceability of conversion clauses is beyond the scope of this opinion.

recovery, Client agrees to immediately pay Lawyer at Lawyer's hourly rate for all time expended. Client has never engaged a lawyer before.

Analysis of Scenario No. 1: California law permits a discharged attorney to seek a *quantum meruit* fee under appropriate circumstances. Thus, one effect of this fee agreement is to replace Lawyer's pre-existing right to seek *quantum meruit*, with a contractual entitlement to immediate payment of Lawyer's hourly rates, regardless of outcome, results obtained, or the reasonableness of Lawyer's rate or hours expended. Thus, this clause could purport to entitle the attorney to payment where the contingency is never achieved – meaning the attorney's entitlement to payment is not contingent at all. Coupled with the unsophistication of the client here, the conversion to hourly fees without regard to the occurrence of the contingency, and the immediate obligation to pay same, this conversion clause impermissibly interferes with Client's right to discharge Lawyer. Further, replacement of Lawyer's *quantum meruit* rights with a contractual entitlement to hourly fees regardless of rate or number of hours could lead to an unconscionable fee being sought or obtained – (although from the limited facts presented it cannot be determined that the fee set forth in the agreement is *per se* unconscionable, or even higher than a quantum meruit fee). Because it interferes with Client's right to discharge Lawyer, this conversion clause is ethically prohibited.

Scenario No. 2: Fee Agreement for a litigation matter provides that Lawyer will be paid a contingent fee of 35% of the recovery, but if the attorney-client relationship ends (for any reason) before the recovery is obtained (whether the Lawyer withdraws or is terminated by the Client), Client agrees to pay Lawyer – only if and when the contingency occurs – per Lawyer's hourly rate for all time expended

Analysis of Scenario No. 2. This arrangement is subject to much of the same analysis as Scenario No. 1. It is ethically prohibited for the additional reason that it provides Lawyer with the ability to unilaterally convert the contingent fee to a guaranteed hourly fee at Lawyer's sole discretion, rendering the fee non-contingent, and providing Lawyer with the ability to potentially gain a greater fee than the contingent fee. Not only would this arrangement burden Client's right to discharge attorney as described in the analysis of Scenario No. 1, but it would also provide for Lawyer to obtain unconscionable fee by terminating the representation when it appears profitable. Depending upon the circumstances, the hourly fee claimed by the discharged attorney may also restrict the client's right to discharge counsel by operating as a penalty for exercise of that right, and by rendering the case unreasonably unappealing to potential successor contingent fee counsel. Depending on the circumstance, this conversion clause would also improperly permit a contingent fee lawyer who withdraws from the representation without cause to obtain a fee (in quantum meruit or otherwise) to which the lawyer is not legally entitled. *See, Rus Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal. App. 4th 656, addressed *supra*;

Scenario No. 3: Contingent fee agreement between attorney and a client who is a sophisticated consumer of legal services entitles the lawyer to a 40% contingent fee. The agreement also expressly notes that the client has the right to discharge the attorney at any time for any reason, but if the client discharges the attorney, the client agrees to pay the attorney's set hourly rates for all work legitimately and reasonably performed prior to discharge, with that payment due at the time of recovery in the case. If no recovery is obtained, no such payment will be due.

Analysis of Scenario No. 3. While several factors in Scenario No. 3 suggest client protections that weigh in favor of this particular conversion clause it is the view of the Committee that a deeper analysis reveals it is unlikely to be ethically permissible. The factors suggesting it is ethically permissible include the fact that this conversion clause cannot be triggered or manipulated by the attorney choosing to terminate the representation, that the fee agreement expressly affirms and informs the client of the client's absolute right to discharge the attorney, that the only fees for work legitimately and reasonably performed will be paid, and the fact that the alternate fee is only due if the client obtains the recovery in the litigation, thus the client will not owe any fee if the client is not successful in the litigation. However, the effect of this conversion clause, if triggered by the client's exercise of the client's absolute right to terminate counsel, is to replace the terminated lawyer's *quantum meruit* rights with an express agreement to pay for the attorney's time on an hourly fee basis without any limitation as to total amount. Thus, the discharged lawyer's hourly fee could be grossly disproportionate to the value of the legal services provided or when compared to the value of the entire case or recovery obtained, potentially leading to an unconscionable fee. The uncapped hourly fee, depending upon its full amount relative to the size of any reasonably anticipate recovery in the case, may also impede the client's ability to retain successor contingent counsel, thereby restricting and/or penalizing client's exercise of client's absolute right to discharge counsel. For these reasons, this conversion clause is unlikely to be ethically permissible, despite the sophistication of the client.

Scenario No. 4: Contingent fee agreement provides that if (1) a settlement offer is made to client, (2) Lawyer recommends Client accept the offer, (3) Client rejects that settlement offer, and (4) Client ultimately recovers less than that settlement offer, then Lawyer shall be entitled to Lawyer's contingent fee computed as against the amount of the rejected settlement offer.

Analysis of Scenario No. 4. The effect of the fee agreement in Scenario No. 4 is to provide significant pressure upon Client to follow Lawyer's advice to accept a settlement by potentially penalizing Client for failing to do so. This arrangement attempts to shift decisional authority from the Client to the Lawyer by exposing the Client to increased risk if Client does not do as Lawyer sees fit. This arrangement impermissibly interferes with Client's right to decide whether to settle, and is therefore ethically prohibited, regardless of whether the Client is a sophisticated consumer of legal services. It also likely seeks an unconscionable fee by imposing the attorney's contingent fee percentage against a phantom-recovery that never actually occurred. Additionally, this conversion

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clause fails to account for legitimate non-monetary goals which the client may have with respect to the representation, further limiting the client's rights under rule 1.2.

Scenario No. 5: Fee agreement provides that Lawyer will represent client (a business entity) in the prosecution and defense of claims in litigation (where client is both prosecuting its own claims for \$10,000,000, and is being sued for \$2,000,000) on a contingent fee of (1) 35% of affirmative recovery and (2) 35% of the amount of any reduction in the amount sought by client's litigation adversaries (the "defensive contingency" to be computed by reducing the \$2,000,000 sought against client by the amount if any that client is ultimately found liable on that claim, and applying the 35% contingent fee to that delta). The fee agreement further provides that in the event that Client chooses to settle the litigation for a walk-away, Lawyer shall be entitled to the greater of (1) the 35% defensive contingent fee, or (2) a fee determined by lodestar method per Lawyer's reasonable hours incurred and Lawyer's reasonable hourly rates (set forth in the agreement). Client is an entity that has extensive experience retaining and working with attorneys in both the litigation and transactional contexts, and was represented in the negotiation of the fee agreement by in-house counsel. During the negotiation of the fee agreement, Lawyer and Client (including Client's in-house counsel) discussed Client's strong preference for contingent fee representation for cash-flow reasons, as well as the possibility that, depending on Client's ever-changing business needs, Client might ultimately, at any point in the litigation, choose not to pursue its valuable affirmative claims if it can secure resolution, which Client understood could undermine its ability to obtain a simple contingent fee representation. The fee agreement terms were the agreed-upon result of such discussion.

Analysis of Scenario No. 5. This arrangement appears, at least facially, to improperly interfere with Client's right to decide whether to settle. However, closer analysis reveals this to be the rare settlement-related conversion clause that may be ethically permissible. The significant sophistication of the client (indeed, represented in negotiation of the fee agreement by in-house counsel) is a material factor, and is important to the analysis. It is also material that the fee agreement negotiations explored the impetus and effect of the alternate fee, and that the alternate fee was designed to encourage Lawyer to provide a contingent fee representation (Client's preference) despite the real and disclosed risk that Client may chose not to pursue its valuable affirmative claims to conclusion. Without an arrangement akin to this conversion clause, client was extremely unlikely to be able to secure contingent fee counsel, which was client's preference. Thus, under the specific circumstances presented, the alternate fee neither interferes with Client's decision whether to settle, nor constitutes an unconscionable fee, as described. Therefore, this conversion clause is likely to be ethically permissible. The Committee cautions, however, that this is a rare conclusion, based on highly unusual circumstances which, here, include a highly sophisticated client and informed written consent to the unusual fee arrangement.

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CONCLUSION

339 Conversion clauses are not ethically prohibited *per se*, but must be carefully scrutinized on a
340 case-by-case basis, including application of the factors identified above. Conversion clauses
341 that interfere with a client's right (1) to terminate an attorney, or (2) to decide whether to
342 settle are ethically prohibited, as are conversion clauses that would result in an unconscionable
343 fee, either facially or as-applied.

344 This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of
345 the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of
346 California, its Board of Trustees, any persons, or tribunals charged with regulatory
347 responsibilities, or any member of the State Bar.

REDLINE

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
PROPOSED FORMAL OPINION INTERIM NO. 20-0005

CONVERSION CLAUSES IN CONTINGENCY FEE AGREEMENTS ~~AND EARNING AN HOURLY RATE~~
~~WHEN TERMINATED~~

ISSUES: Under what circumstances, if any, are “conversion clauses” in contingent fee agreements ethically permissible?

DIGEST: Conversion clauses are not ethically prohibited *per se*, but require careful ethical scrutiny, and the ~~circumstance~~circumstances where a conversion clause is ethically permissible are rare. They are ethically prohibited where their use may improperly interfere with important client rights or may violate an attorney’s ethical duties, primarily the client’s right to discharge the lawyer or the client’s right to determine whether to settle, and where they would result in an unconscionable fee.

AUTHORITIES

INTERPRETED: Rules of Professional Conduct 1.2, 1.5, and 1.16 of the Rules of Professional Conduct of the State Bar of California.¹

INTRODUCTION AND SCOPE

This opinion addresses the ethical permissibility of conversion clauses in contingent fee agreements. For purposes of this opinion, where an attorney-client fee agreement provides for the attorney to be paid a contingent fee ~~(the “primary contingent fee”)~~, a conversion clause is a contractual provision that, if triggered, converts the fee due to a lawyer from that ~~primary~~ contingent fee to an alternate fee arrangement. Conversion clauses may be drafted so as to be triggered by specified events, but in practice they are typically triggered upon (1) the termination of the attorney-client relationship, or (2) the client’s failure to follow the lawyer’s recommendation regarding whether to accept a settlement proposal.²

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² This opinion is not intended to address the ethical validity or enforceability of hybrid fee agreements, which are distinct from conversation clauses and usually involve the payment of attorneys’ fees in some combination of an hourly rate, flat rate, or contingency fee. For some analysis on ethical issues related to hybrid fee agreements, see San Francisco Bar Association Opinion 1999-1 (opining that as long as the client enters into the fee agreement in an arm’s length transaction and agrees to the fee with informed

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It is the view of the Committee that ~~conversions~~conversion clauses are not ethically prohibited *per se*, but whether a conversion clause is ethically permissible must be carefully evaluated on a case-by-case basis. Conversion clauses are ethically permissible only where they do not interfere with the client's right to discharge the lawyer or the client's right to determine whether to settle, and where they would not result in an unconscionable fee. Therefore, the circumstances of each representation, as well as the precise terms of the fee arrangement and conversion clause, ~~should~~must be carefully scrutinized to ensure that neither the client's right to discharge counsel nor the client's right to decide whether or not to settle (and on what terms) are burdened, and also to ensure that the conversion clause would not result in an unconscionable fee.³ Because conversion clauses are often complex in their operation, the sophistication of the client is also an important consideration The Committee notes that when this analysis is performed, the circumstances wherein a particular conversion clause may be ethically permissible are rare.

DISCUSSION

~~Conversion clauses require careful ethical scrutiny because their use may improperly interfere with important client rights and may violate an attorney's ethical duties. These considerations include a client's right to discharge counsel, a client's right to determine the objectives of a representation (especially with regard to settlement), and the attorney's duty not to seek or collect an unconscionable fee. Because conversion clauses are often complex in their operation, the sophistication of the client is also an important consideration.~~

A. The Client's Right to Discharge Counsel.

Both the rules and California decisional law confirm a client's absolute right to discharge his or her attorney. Rule 1.16(a)(4); *Fracasse v. Brent* (1972) 6 Cal.App.3d 784; *Kroff v. Larson* (1985) 167 Cal.App.3d 857, 860 (client has absolute right at any time to discharge an attorney, with or without cause). Conversion clauses must be scrutinized to ensure that they do not directly or indirectly interfere with this right. For example, conversion clauses which purport to entitle a lawyer in a contingent fee representation, if terminated, to his or her hourly rate for hours worked (regardless of whether the contingency occurs, or what amount is recovered) pose a high risk of interfering with the client's right to discharge counsel. See, *Fracasse, supra* (improper to burden the client [in contingency cases] with an absolute obligation to pay the attorney regardless of outcome). Often a client in a contingent fee representation does not possess the means to pay an hourly fee, and has retained contingent fee counsel for this reason. A conversion clause that requires the client to pay the lawyer's hourly rate if the attorney is discharged is likely to impermissibly interfere with the client's absolute right to

consent, such arrangements would be permissible under the California Rules of Professional Conduct (former rule 4-200, current rule 1.5) provided the fee charged is not unconscionable).

³ This opinion concerns only the issue of whether conversion clauses are ethically prohibited, not whether or to what extent they are legally enforceable. Additionally, this opinion does not address the propriety or enforceability of attorney's liens resulting from conversion clauses.

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discharge the lawyer, and must be carefully scrutinized for this possibility. *See, Colorado State Bar Ethics Opinion 100; Compton v. Killtelson* (2007, Alaska Supreme Court) 171 P.3d 172 (contingent fee agreement which retroactively converted to hourly fee upon discharge of attorney was unconscionable and violation of Model Rule 1.2); *U.S. Postal Service v. Haselrig Corp* (D. Md. 2004) 349 F. Supp. 2d 955 (agreement that attempted to unlawfully penalize client for discharge of attorney (by requiring payment of 40% contingency or flat \$35,000) was “unreasonable at inception”).

A conversion clause may not penalize a client who discharges the lawyer. Lawyers often argue that conversions clauses are necessary to “protect” contingent fee lawyers from bad-faith termination by wily clients. However, in appropriate circumstances, established law already protects a contingent fee lawyer under the principles of *quantum meruit*,⁴ which allow a terminated contingent attorney to receive a fee commensurate with the reasonable value of the services provided. Because the existing principles of *quantum meruit* already provide a discharged attorney (who is not otherwise disentitled to a fee) to receive a reasonable fee for the services performed, the Committee is skeptical of the claimed need for further “protection” which would entitle a discharged contingent fee attorney to more than a reasonable fee.⁵ As the court in *Fracasse* noted (in a different but related context): “we find no injustice in a rule awarding a discharged attorney the reasonable value of the services he has rendered up to the time of discharge”, a rule which the Court noted, “preserve[s] the client's right to discharge his attorney without undue restriction, and yet acknowledge[s] the attorney’s right to fair compensation for work performed.” *Fracasse* at 791. In practice, many conversion ~~clause~~clauses are merely improper penalties masquerading as attorney “protections.” A conversion clause that operates as a penalty for a client discharging a lawyer improperly burdens the client’s right to do so, and is ethically prohibited.

Related to the issue of unconscionability (addressed in Section C. below) is whether the conversion clause provides for an alternate fee which would have the effect of improperly restricting a client’s right to discharge counsel by rendering the representation unreasonably unappealing to potential successor contingency counsel. For example, a conversion clause which claims to entitle a terminated contingency-fee lawyer to more than a *quantum meruit* fee, no matter how much work has been performed or remains to be performed, is likely to

⁴ “Quantum meruit” refers to the principle that the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered. The doctrine of *quantum meruit*, where appropriate, allows attorneys to recover the reasonable value of their services even in the absence of a valid or enforceable contract. *See, Sheppard, MullingMullin, Richter & Hampton, LLP v J-M Manufacturing Co., Inc.* (2018) 6 Cal.5th 59, 88. Although beyond the scope of this opinion, California has a well-developed body of law concerning when a discharged lawyer’s conduct entitles or disentitles the lawyer to a reasonable fee (i.e. a *quantum meruit*, recovery). ~~See~~ such as where a contingent fee attorney withdraws from the case without justifiable cause (see generally, *Rus Miliband & Smith v. Conkle & Olesen* (2003) 113 Cal. App. 4th 656; *Hensel v. Cohen* (1984) 155 Cal. App. 3d, 563; *Fracasse*, supra, 791.) or certain ethical violations such as an egregious conflict of interest (see generally *Cal Pak Delivery, Inc. v. United Parcel Service Inc.* (1997) 52 Cal. App. 4th 1).

⁵ For further analysis on the factors involved in determination of a reasonable fee, see State Bar of California Arbitration Advisory 1998-03.

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97 make it impossible for the client to secure replacement counsel, thus impermissibly burdening
98 the client's right to discharge counsel.⁶

99

⁶ In addition to impermissibly interfering with a client's right to discharge the lawyer, such a conversion clause may likely ~~may~~ also ~~seeks~~ be found to be an attempt to charge or collect an unconscionable fee, and must be appropriately evaluated on that basis as well. *See, In re Van Sickle* (Cal. Bar. Ct. Aug. 24, 2006). *Accord, Colorado Ethics Opinion 100, supra.*

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For these reasons, it is the view of the Committee that any conversion clause which purports to entitle a discharged contingent-fee attorney to more than *quantum meruit* is likely to be ethically prohibited, and the circumstances in which such a conversion would be ethically permissible are rare. Further, it is the view of the Committee that a conversion clause which seeks to entitle a contingent-fee lawyer to *any* fee in circumstances under which that contingent-fee lawyer would otherwise be legally disentitled to recover a fee in *quantum meruit*, is ethically prohibited. (See footnote No. 3, *supra*).

The Committee also notes that a lawyer's contingent fee typically includes a premium for the risk that the contingency may not occur. A conversion clause that allows a lawyer to effectively avoid contingent risk likely renders the ostensible "contingent fee" not contingent at all, and therefore the charging of a risk-premium may be unconscionable. Moreover, whereas a *quantum meruit* fee may not exceed the contract price,⁷ under a conversion clause the hourly rate fee which the lawyer might claim might contain no such limit and may even exceed the total value of the case.

Timing of the payment of the alternate fee is also an important factor for analysis. If a conversion clause entitles a lawyer (upon discharge) to an *immediate* fee, prior to the occurrence of the contingency, such a clause is likely to interfere with a client's right to discharge counsel, and likely to be ethically prohibited. Thus, even an alternate fee that would not be improper or unconscionable if payment were due at the time of the contingent recovery, may be ethically prohibited if its timing is such that it interferes with the client's right to discharge the lawyer.

In light of these considerations, it is the view of the Committee that a conversion clause triggered by the termination of the lawyer (whether initiated by the lawyer or the client) which purports to entitle the lawyer to a non-contingent fee regardless of whether the contingency actually occurs or in what amount, is likely to be ethically prohibited ~~for improperly burdening a client's right to discharge their lawyer~~.

Additionally, in appropriate circumstances, a conversion clause must also be scrutinized to ensure it is not inconsistent with a lawyer's advertisements or assurances to potential clients. For example, any conversion clause that would provide for a lawyer to be entitled to non-contingent alternate fee likely would be ethically impermissible where the lawyer had advertised or made a representation to the client to the effect that no fee would be due unless the client recovers.

⁷ *Cazares v. Saenz* (1989) 208 Cal.App.3d. 279.

B. The Client's Right to Decide Whether or Not to Settle.

A lawyer is ethically required to abide by a client's decision concerning the objectives of the representation. The rules expressly extend this precept to the decision to accept or reject a settlement offer. "[A] lawyer shall abide by a client's decision whether to settle a matter," rule 1.2(a). Nonetheless, conversion clauses are often designed to "protect" an attorney against a client's unreasonable or even bad-faith decisions regarding whether to accept or reject settlement proposals contrary to the lawyer's recommendation.

Such conversion clauses often purport to entitle the lawyer to payment of the lawyer's contingent fee percentage calculated against any settlement offer that the lawyer recommends the client to accept, but which the client rejects. Alternatively, some clauses entitle a lawyer to the lawyer's hourly rates if the client accepts a settlement offer (or walk-away agreement) which the lawyer believes is insufficient.

While ethics committees of other states have approached such settlement-related conversion clauses from a variety of perspectives, all tend to carefully scrutinize such clauses. By way of example only, see, *Wis State Bar Prof'l Ethics Comm. Formal Op. E-82-5* (1982) (a contingent fee agreement that permits charging hourly fees if attorney deems a settlement offer inadequate is overreaching and unethical); *Philadelphia Bar Association Ethics Opinion 2001-1* (majority opinion would permit conversion where there is clear advanced agreement on the goals of representation and agreement as to alternate methods of compensation if the client's goals change; the minority opinion would permit conversion clauses for sophisticated clients, not unsophisticated clients); *Nebraska Ethics Advisory Opinion 95-1* (a provision triggered by a client not following attorney's settlement advice, which allows the attorney to choose between the contingent percentage or full hourly fee, restricts the client's authority to settle a matter).

The Committee agrees that careful scrutiny of settlement-related conversion clauses is required, and that settlement-related conversion clauses are ethically permissible only in very limited circumstances where the attorney and client clearly and effectively agree to specific objectives of the representation in advance, agree to an alternate fee if the client should change her or his mind about those objectives, and where the conversion clause at issue under the specific circumstances presented, does not restrict the client's right to decide whether to settle, and on what terms.⁸

It is the view of the Committee that the requirement imposed by rule 1.2(a) that "a lawyer shall abide by a client's decision whether to settle a matter" is clear and unwaivable, and its elimination by contract is simply not permitted under rule 1.2(b). See, for example, *Amjadi v. Brown* (2021) 68 Cal App. 5th 383, holding that a provision in a fee agreement purporting to

⁸ For Example, see *LACBA Formal Ethics Opinion No. 505* (2000) which approved of an engagement agreement by a public interest law firm which waived all attorney's fees only so long as the client did not enter into any settlement agreement which required confidentiality. It is the view of this committee that such an arrangement permissibly falls within now exceptions articulated above, and therefor is not prohibited.

grant the lawyer the right to accept a settlement offer on behalf of the client in the lawyer's "sole discretion" violates the rules and is void;⁹ *See also, In the Matter of Guzman* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 308, 314-315 in which the State Bar court held that "[a]ttempts by an attorney to restrict a client's right to control his or her case are invalid and evidence of overreaching." A conversion clause that interferes with a client's right to determine whether to settle is ethically prohibited.¹⁰ Thus, conversion clauses keyed to the acceptance or rejection of settlement offers are ethically prohibited, except in the rare and narrow circumstances where (1) the goals of the representation are clearly understood and agreed-to in advance, (2) the lawyer and client also agree in advance to an alternate payment method that complies with rule 1.5, and, closely related, (3) the client's informed written consent is obtained goals and alternate payment arrangement are communicated to the client in a manner that should be reasonably be understood by the client and confirmed by the client, and (4) the operation of the conversion clause under the circumstances is not otherwise unconscionable under the circumstances rule 1.5.

C. The Attorney's Duty Not to Seek or Collect an Unconscionable Fee.

Rule 1.5 prohibits a lawyer from making an arrangement for, charging, or collecting an unconscionable fee, and sets forth 13 factors to be considered (without limitation) in determining the unconscionability of a fee. Just as any ~~primary~~ contingent fee must comply with rule 1.5, so too must any alternate fee arising from a conversion clause. Conversion clauses can impact an unconscionability analysis in numerous ways, and the determination of whether a conversion clause would result in an unconscionable alternative fee requires analysis of the conversion clause both as it is written, and as it is applied to a specific factual scenario.

In evaluating whether a conversion clause tied to termination of the lawyer is unconscionable and therefore ethically prohibited, important factors include consideration of whether a conversion clause triggers an alternate fee regardless of whether the relationship is terminated by the client or the attorney, and regardless of the reason for the termination. Careful ethical scrutiny is particularly warranted where the fee agreement allows conversion to be subject to manipulation by the lawyer, for example, by allowing the lawyer to claim the higher fee where it is the lawyer who causes the termination of the attorney-client relationship. A conversion clause of this type could encourage lawyers terminate a representation (and even to abandon the client) when it is to the lawyer's economic advantage to terminate a representation in order

⁹ *Amjadi* also held that attempts by lawyers to wrest control from clients as to settlement decisions not only violate rule 1.2, but also create a conflict of interest between the lawyer and client under rule 1.7(b) whenever the client and attorney disagree about settlement.

¹⁰ Such conversion clauses also may introduce an improper speculative element in favor of the lawyer: who can know whether the opposing party would or could have actually performed under the rejected agreement against which the lawyer now seeks to determine his or her fee? Such uncertainty is indicia of overreach by a lawyer which further invades the client's right to determine whether or not to settle.

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to trigger an alternate fee. Conversion clauses which would permit and incentivize such divided loyalty and overreach are not ethically permissible.

A conversion clause which calls for payment of an alternate contingent fee *prior* to, or *regardless* of, the occurrence of the contingency, is functionally not a contingent fee at all, and is unlikely to survive an unconscionability determination if its amount would typically reflect a risk premium where such risk is not in fact present. *See* rule 1.5 (b) (1), (2) (concerning overreach, fraud, and failure to disclose material facts).

In any unconscionability analysis, the sophistication of the client is a relevant consideration. *See*, rule. 1.5 (b)(4), *Cotchette, Pitre & McCarthy v. Universal Paragon Group* (2010) 187 Cal. App. 4th 1405. Conversion clauses can be complex in construction and effect, and difficult to understand. Thus, the client’s level of sophistication as a consumer of legal services should be considered.

Similarly, a conversion clause which requires payment of a pre-determined contingent fee to a discharged lawyer, regardless of the work actually performed or amount of work remaining in the matter, is unlikely to survive an unconscionability analysis, particularly if triggered early in a representation.¹¹ *See* rule 1.5 (b)(3), (7), (12); *see also Matter of Scapa & Brown* (Rev. Dept. 1993) (although finding culpability for other violations, when assessing aggravating and mitigating circumstances, the Review Dept. noted that the attorney’s fee contract required payment of attorney’s full contingent fee percentage even if discharged and in the alternative entitled the attorney to payment of a “minimum” hourly fee if client discharged attorney regardless of work performed, and that the attorneys “knew” that if discharged for any reason they were limited to the reasonable value of services (per *Fracasse, supra*)).¹² A conversion clause which converts a contingent fee to the attorney’s hourly rate upon termination of the attorney-client relationship must be carefully evaluated for unconscionability and overreach, especially where, because a representation began primarily as a contingent fee representation, the lawyer may or may not have incurred excessive or unreasonable hours on the matter.¹³

¹¹ ~~To be clear: this~~ This opinion does not address agreements between attorneys, or between departing attorney’s and their firms, as to the respective entitlement of a contingent attorney’s fee portion of a client recovery (where such agreement does not affect the amount of recovery to which the client is entitled). Such circumstances are not conversion clauses as addressed by this opinion. They are governed by rule 1.5.1 and other authorities, and are ~~being~~beyond the scope of this opinion.

¹² As is discussed in Section A., *supra*, established law already provides for payment to discharged contingent fee counsel on a *quantum meruit* basis where appropriate.

¹³ While Rule 1.5 determines unconscionability for purposes of an attorney’s ethical duties, California law requires that attorney fee agreements and billings “must be fair, reasonable and fully explained to the client”. *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App. 4th 419, 430-31 (quoting *Altschul v. Syble* (1978) 83 Cal. App. 3d 153, 162). Again, the legal enforceability or unenforceability of conversion clauses is beyond the scope of this opinion.

FACTUAL SCENARIOS AND ANALYSIS OF EACH

Scenario No. 1: Fee agreement for a litigation matter provides that Lawyer will be paid a contingent fee of 35% of the recovery, but if Lawyer is discharged by the client prior to recovery, Client agrees to immediately pay Lawyer at Lawyer's hourly rate for all time expended. Client has never engaged a lawyer before.

Analysis of Scenario No. 1: California law permits a discharged attorney to seek a *quantum meruit* fee under appropriate circumstances. Thus, one effect of this fee agreement is to replace Lawyer's pre-existing right to seek *quantum meruit*, with a contractual entitlement to immediate payment of Lawyer's hourly rates, regardless of outcome, results obtained, or the reasonableness of Lawyer's rate or hours expended. Thus, this clause could purport to entitle the attorney to payment where the contingency is never achieved – meaning the attorney's entitlement to payment is not contingent at all. Coupled with the unsophistication of the client here, the conversion to hourly fees without regard to the occurrence of the contingency, and the immediate obligation to pay same, this conversion clause impermissibly interferes with Client's right to discharge Lawyer. Further, replacement of Lawyer's *quantum meruit* rights with a contractual entitlement to hourly fees regardless of rate or number of hours could lead to an unconscionable fee being sought or obtained – (although from the limited facts presented it cannot be determined that the fee set forth in the agreement is *per se* unconscionable, or even higher than a quantum meruit fee). Because it interferes with Client's right to discharge Lawyer, this conversion clause is ethically prohibited.

Scenario No. 2: Fee Agreement for a litigation matter provides that Lawyer will be paid a contingent fee of 35% of the recovery, but if the attorney-client relationship ends (for any reason) before the recovery is obtained (whether the Lawyer withdraws or is terminated by the Client), Client agrees to pay Lawyer – only if and when the contingency occurs – per Lawyer's hourly rate for all time expended

Analysis of Scenario No. 2. This arrangement is subject to much of the same analysis as Scenario No. 1. It is ethically prohibited for the additional reason that it provides Lawyer with the ability to unilaterally convert the contingent fee to a guaranteed hourly fee at Lawyer's sole discretion, rendering the fee non-contingent, and providing Lawyer with the ability to potentially gain a greater fee than the contingent fee. Not only would this arrangement burden Client's right to discharge attorney as described in the analysis of Scenario No. 1, but it would also provide for Lawyer to obtain unconscionable fee by terminating the representation when it appears profitable. Depending upon the circumstances, the hourly fee claimed by the discharged attorney may also restrict the client's right to discharge counsel by operating as a penalty for exercise of that right, and by rendering the case unreasonably unappealing to potential successor contingent fee counsel. Depending on the circumstance, this conversion clause would also improperly permit a contingent fee lawyer who withdraws from the representation without cause to obtain a fee (in quantum meruit or otherwise) to which the lawyer is

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not legally entitled. *See, Rus Miliband & Smith v. Conkle & Olesten* (2003) 113 Cal. App. 4th 656, addressed *supra*;

Scenario No. 3: Contingent fee agreement between attorney and a client who is a sophisticated consumer of legal services entitles the lawyer to a 40% contingent fee. The agreement also expressly notes that the client has the right to discharge the attorney at any time for any reason, but if the client discharges the attorney, the client agrees to pay the attorney's set hourly rates for all work legitimately and reasonably performed prior to discharge, with that payment due at the time of recovery in the case. If no recovery is obtained, no such payment will be due.

Analysis of Scenario No. 3. While several factors in Scenario No. 3 suggest client protections that weigh in favor of this particular conversion clause it is the view of the Committee that a deeper analysis reveals it is unlikely to be ethically permissible. The factors suggesting it is ethically permissible include the fact that this conversion clause cannot be triggered or manipulated by the attorney choosing to terminate the representation, that the fee agreement expressly affirms and informs the client of the client's absolute right to discharge the attorney, that the only fees for work legitimately and reasonably performed will be paid, and the fact that the alternate fee is only due if the client obtains the recovery in the litigation, thus the client will not owe any fee if the client is not successful in the litigation. However, the effect of this conversion clause, if triggered by the client's exercise of the client's absolute right to terminate counsel, is to replace the terminated lawyer's *quantum meruit* rights with an express agreement to pay for the attorney's time on an hourly fee basis without any limitation as to total amount. Thus, the discharged lawyer's hourly fee could be grossly disproportionate to the value of the legal services provided or when compared to the value of the entire case or recovery obtained, potentially leading to an unconscionable fee. The uncapped hourly fee, depending upon its full amount relative to the size of any reasonably anticipate recovery in the case, may also impede the client's ability to retain successor contingent counsel, thereby restricting and/or penalizing client's exercise of client's absolute right to discharge counsel. For these reasons, this conversion clause is unlikely to be ethically permissible, despite the sophistication of the client.

Scenario No. 4: Contingent fee agreement provides that if (1) a settlement offer is made to client, (2) Lawyer recommends Client accept the offer, (3) Client rejects that settlement offer, and (4) Client ultimately recovers less than that settlement offer, then Lawyer shall be entitled to Lawyer's contingent fee computed as against the amount of the rejected settlement offer.

Analysis of Scenario No. 4. The effect of the fee agreement in Scenario No. 4 is to provide significant pressure upon Client to follow Lawyer's advice to accept a settlement by potentially penalizing Client for failing to do so. This arrangement attempts to shift decisional authority from the Client to the Lawyer by exposing the Client to increased risk if Client does not do as Lawyer sees fit. This arrangement impermissibly interferes with Client's right to decide whether to settle, and is therefore ethically prohibited,

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regardless of whether the Client is a sophisticated consumer of legal services. It also likely seeks an unconscionable fee by imposing the attorney's contingent fee percentage against a phantom-recovery that never actually occurred. Additionally, this conversion clause fails to account for legitimate non-monetary goals which the client may have with respect to the representation, further limiting the client's rights under rule 1.2.

Scenario No. 5: Fee agreement provides that Lawyer will represent client (a business entity) in the prosecution and defense of claims in litigation (where client is both prosecuting its own claims for \$10,000,000, and is being sued for \$2,000,000) on ~~a primary~~ a contingent fee of (1) 35% of affirmative recovery and (2) 35% of the amount of any reduction in the amount sought by client's litigation adversaries (the "defensive contingency" to be computed by reducing the \$2,000,000 sought against client by the amount if any that client is ultimately found liable on that claim, and applying the 35% contingent fee to that delta). The fee agreement further provides that in the event that Client chooses to settle the litigation for a walk-away, Lawyer shall be entitled to the greater of (1) the 35% defensive contingent fee, or (2) a fee determined by lodestar method per Lawyer's reasonable hours incurred and Lawyer's reasonable hourly rates (set forth in the agreement). Client is an entity that has extensive experience retaining and working with attorneys in both the litigation and transactional contexts, and was represented in the negotiation of the fee agreement by in-house counsel. During the negotiation of the fee agreement, Lawyer and Client (including Client's in-house counsel) discussed Client's strong preference for contingent fee representation for cash-flow reasons, as well as the possibility that, depending on Client's ever-changing business needs, Client might ultimately, at any point in the litigation, choose not to pursue its valuable affirmative claims if it can secure resolution, which Client understood could undermine its ability to obtain a simple contingent fee representation. The fee agreement terms were the agreed-upon result of such discussion.

Analysis of Scenario No. 5. This arrangement appears, at least facially, to improperly interfere with Client's right to decide whether to settle. However, closer analysis reveals this to be the rare settlement-related conversion clause that may be ethically permissible. The significant sophistication of the client (indeed, represented in negotiation of the fee agreement by in-house counsel) is a material factor, and is important to the analysis. It is also material that the fee agreement negotiations explored the impetus and effect of the alternate fee, and that the alternate fee was designed to encourage Lawyer to provide a contingent fee representation (Client's preference) despite the real and disclosed risk that Client may chose not to pursue its valuable affirmative claims to conclusion. Without an arrangement akin to this conversion clause, client was extremely unlikely to be able to secure contingent fee counsel, which was client's preference. Thus, under the specific circumstances presented, the alternate fee neither interferes with Client's decision whether to settle, nor constitutes an unconscionable fee, as described. Therefore, this conversion clause is likely to be ethically permissible. The Committee cautions, however, that this is a rare conclusion, based on highly unusual circumstances which, here, include a highly sophisticated client and informed written consent to the unusual fee arrangement.

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CONCLUSION

347 Conversion clauses are not ethically prohibited *per se*, but must be carefully scrutinized on a
348 case-by-case basis, including application of the factors identified above. Conversion clauses
349 that interfere with a client's right (1) to terminate an attorney, or (2) to decide whether to
350 settle are ethically prohibited, as are conversion clauses that would result in an unconscionable
351 fee, either facially or as-applied.

352 This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of
353 the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of
354 California, its Board of Trustees, any persons, or tribunals charged with regulatory
355 responsibilities, or any member of the State Bar.

Working Group Recommendation
re Conversion Clause Interim Opinion

Based upon the California authorities cited in the draft Proposed Formal Opinion Interim No. 20-0005, “Conversion Clauses in Contingent Fee Agreements” and after consideration of public comments received in response to the Interim Opinion, the Working Group continues unanimously to recommend that the “bottom line” conclusion should be that such clauses are never ethically proper.

In past meetings, on the other hand, some COPRAC members have been hesitant to accept this recommendation. The hesitancy apparently stems from two considerations. First, a minority of ethics opinions and some caselaw in other jurisdictions have concluded that a contract clause that converts a contingent fee to an hourly fee is not *per se* unethical. Second no California authority to date has expressly held that such a conversion clause is *per se* ethically improper.

The Working Group believes the first criticism is misplaced because California is unique among all jurisdictions in the Nation regarding the ethical standards by which fee contracts are evaluated. In all other jurisdictions, the ethical standard for the enforceability of a fee contract is that no fee agreement ethically may provide for the charging or collection of an “unreasonable” fee. Typically, this means subjecting the operation of the contract to a lodestar-type of analysis, taking into account all the usual factors that go into determining a reasonable fee. In other words, in all other jurisdictions, a fee agreement typically is unethical only where the resulting fee is not unreasonable.

Therefore, the difference between California and all other jurisdictions that have considered the enforceability of a conversion clause is that virtually all other jurisdictions to have done so have applied a “reasonableness” standard that is applicable not only to the fee agreement generally but also to the operation of any conversion clause. In our review of a substantial number of opinions and cases in such other jurisdictions, a conversion clause will be enforced where it’s operation results in the overall charge of no more than a reasonable fee and a conversion clause will **not** be enforced where it results in the overall charge of an unreasonable fee. Such a clause also will not be enforced where it otherwise is tainted with some other violation of a statute or rule of professional conduct. Accordingly, with or without a conversion clause, all contracts in such non-California jurisdictions will be enforceable only to the extent that they provide for the charging of no more than a reasonable fee.

Noteworthy in these analyses in other jurisdictions is the recognition that, since in all circumstances no more than a reasonable fee permissibly can be charged, the conversion clause does not unduly burden the client's unfettered right to terminate the relationship "with or without cause or for no reason at all," which is the Rule in California. See, *CRPC Rule 3.16(a)(4)*; *Fracasse v. Brent* (1972) 6 Cal.App.3d, 784, 791.

47 California, on the other hand, permits an attorney and client to negotiate for a fee
48 that is “north” of reasonable as otherwise might be determined under a lodestar-type
49 analysis provided that the fee is not “unconscionable.” See *Pech v. Morgan* (2021) 61
50 Cal.App.5th 841, 846. Notably, in *Pech*, the Court recognized that contracting for such a
51 fee “north” of reasonable requires compliance with B&P Code section 6148, governing
52 only the hourly fee portion of a fee contract. The contingent fee portion of any fee contract,
53 on the other hand, is governed by section 6147 (see, *Arnall v. Superior Court* (2010)
54 190.Cal.App.4th 360.

55
56 Under such circumstances, in California, unique among all the other states, a
57 conversion clause in a contingent fee contract could result in an overall charge that will
58 be in excess of an otherwise reasonable fee. And, for this reason, cases such as
59 *Fracasse* have held that, since the discharged attorney is permitted to recover under
60 *quantum meruit* (absent some other violation of the CRPC or a termination for cause), a
61 conversion clause that requires a fee in addition to *quantum meruit* recovery does place
62 an undue burden on the client’s unfettered right to terminate the relationship. Further,
63 cases such as *In re: Scapa & Brown* (1993) 2 Cal. State Bar Ct. Rptr. 635, have held that
64 an attorney’s attempt to “contract around” *quantum meruit* to seek a fee higher than
65 *quantum meruit* is a disciplinable offense.

66
67 In response to the second criticism – that there is no California “on all fours” with
68 the Interim Opinion should it be published “without exceptions” – in addition to cases such
69 as *Fracasse* and *Scapa*, other California authorities consistently have held contract
70 provisions that violate the CRPC are either void or voidable or unenforceable, leaving the
71 attorney to *quantum meruit* only, absent an “egregious” violation which could permit no
72 recovery at all.

73
74 Notable examples are the cases involving violations of old Rule 2-200 and now
75 Rule 1.5.1. In *Chambers v. Kay* (2002) 29 Cal. 4th 152, 159, where the Supreme Court
76 held that an agreement to divide a fee is void and unenforceable absent strict compliance
77 with the rule’s requirement that the client consent in writing, even in the face of testimony
78 that the client was fully aware of and orally had agreed to the fee split between her
79 attorneys. *Chambers* left open the question of whether *quantum meruit* recovery may be
80 had despite the violation. In the related case of *Huskinson & Brown v. Wolf* (2004) 32
81 Cal.4th 113, 125, the Supreme Court concluded that *quantum meruit* recovery was
82 appropriate but, significantly, it also held that such recovery must be determined by
83 appropriate factors (such as the typical lodestar-type factors) *other than the contract*
84 *amount*.

85
86 Following the holdings in *Chambers* and *Huskinson*, the Supreme Court decided
87 *Sheppard, Mullin, Richter & Hampton LLP v. J-M Mfg. Co.* (2018) 6 Cal.5th 59, 81, holding
88 that any fee agreement that fails to comply fully with the CRPC is “contrary to the public
89 policy of the state” and “is for that reason unenforceable.” As in *Chambers* and *Wilkinson*,
90 the Supreme Court in *Sheppard Mullin* allowed that *quantum meruit* was an adequate
91 safeguard against any unfairness to the attorneys.

93 And, in *Arnall, supra*, at 373, we find instructive reasoning being applied to the
94 related issue of failure to comply with the strict language of B&P Code section 6147
95 regulating contracts for charging a contingent fee. In *Arnall*, in a hybrid contingent fee
96 contract regarding the recovery of a multi-million-dollar tax saving extensively negotiated
97 with an extremely sophisticated client, the omission in the written contract of the singular
98 phrase about the negotiability of the amount was held to have made the contract voidable
99 as to the contingent fee portion of the fee agreement. Explaining its rationale, the Court
100 stated: “[W]hen a statute protects the public by denying compensation to parties who fail
101 to meet regulatory demands, the statute constitutes a legislative determination that the
102 need for compliance outweighs any resulting harshness”
103

104 Accordingly, the Drafting Group is persuaded that ample authority in California
105 supports the proposition that any contract that violates the CRPC or other applicable
106 statute is void or voidable as a matter of public policy and that *quantum meruit* is adequate
107 compensation for any resulting unfairness to the attorney who engages in such a
108 violation. We therefore renew our recommendation that the Interim Opinion be voted out
109 favorably for publication without discussion of possible scenarios where a conversion
110 clause in a contingency fee agreement would result in compensation above or beyond
111 *quantum meruit* upon termination of the attorney-client relationship prior to the happening
112 of the contingent event.
113

114 Finally, there is some sentiment among the Drafting Team that, should there
115 continue to be significant opposition to voting out the Interim Opinion with no exception,
116 the foregoing California authority at a minimum should be revisited by COPRAC to
117 consider whether, rather than adopting a qualified opinion, we instead might withdraw the
118 Interim Opinion altogether.